80-1578
No. _____

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES F. CARPENTER,

Petitioner

v.

CONTINENTAL TRAILWAYS,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals err in concluding that Trailways' retirement of Mr. Carpenter in 1977 was permitted by Section 4(f)(2) of the Age Discrimination in Employment Act (ADEA) of 1967 [29 U.S.C. §623(f)(2)], as written at that time?

CORPORATION LIST

Defendant's relationship with Holiday Inn, Inc. ceased in 1979. Defendant's proper name now is Trailways, Inc.; its parent is New Trails, Inc..

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW.....	i
CORPORATION LIST.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE.....	2
FACTS.....	2
THE WRIT SHOULD NOT BE GRANTED.....	4
A. There Is No Conflict Among The Circuit Courts.....	4
B. There Is No Important Question Of Federal Law To Be Addressed.....	8
C. There Is No Conflict With An Applicable Decision Of This Court.....	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

PAGE

Benzel v. Valley National Bank of Arizona, 633 F.2d 1325 (9th Cir. 1980).... 6

E.E.O.C. v. Baltimore and Ohio Railroad Company, 632 F.2d 1107 (4th Cir. 1980).... 6

General Talking Picture Corp. v. Western Electric Co., 304 U.S. 175 (1938)..... 9

Marshall v. Hawaiian Telephone Co., 575 F.2d 763 (9th Cir. 1978)..... 4

N.L.R.B. v. Pittsburgh Steamship Co., 340 U.S. 498 (1951)..... 9

Sexton v. Beatrice Foods Co., 630 F.2d 478 (7th Cir. 1980)..... 6

United Airlines, Inc. v. McMann, 434 U.S. 192 (1977)..... 8

United States v. ITT Continental Baking Co., 420 U.S. 223 (1974)..... 9

Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978)..... 4

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Continental Trailways, opposes the issuance of a Writ of Certiorari to review the Judgement entered by the United States Court of Appeals for the Sixth Circuit on December 18, 1980, in Case No. 78-1278, styled James F. Carpenter, Plaintiff-Appellee v. Continental Trailways, Defendant-Appellant,

and urges the Court to deny the Petition filed by Mr. Carpenter. 1/

STATEMENT OF THE CASE

FACTS

The final section of the "Highlights Of Our New Retirement Plan" brochure received by Plaintiff in 1974 or 1975 (J.A. 11) 2/ was entitled "THE OFFICIAL DOCUMENT" and provided as follows:

> This folder highlights Continental Trailways' Retirement Plan as it applies in normal situations and does not replace the official document. A copy of the Plan and the Department of Labor D-1 Supplement will be available for inspection during normal working hours in the Personnel Office... (emphasis supplied). 3/

1/ The parties are referred to herein as follows: Petitioner as Plaintiff or Mr. Carpenter; Respondent as Defendant or Trailways.

2/ "J.A." refers to the printed joint appendix filed in the Sixth Circuit.

3/ See page A-28 of Mr. Carpenter's Petition.

The retirement plan provided, in pertinent part:

> A Participant shall be eligible for an early Retirement Pension if his employment with the Employers is terminated, whether at his own option or not, on or after his 55th birthday and before his Normal Retirement Date, provided he has completed ten (10) or more years of Vesting Service...(emphasis supplied)

As set forth above, the final section of the "highlights" brochure received by Plaintiff specifically stated that the highlights contained therein did not replace the actual retirement plan, which was available for inspection in Defendant's Personnel Office. 4/ Furthermore, it reasonably cannot be expected that such a brochure would mention or explain all of the provisions of a lengthy retirement plan. Accordingly, Plaintiff cannot claim that Trailways "misrepresented" the provisions of its plan to him.

4/ There was no evidence that Plaintiff ever was denied access to the Plan or that he ever asked for a copy.

THE WRIT SHOULD NOT BE GRANTED

A. There Is No Conflict Among The Circuit Courts

On the basis of the facts in the record before it, the Sixth Circuit Court of Appeals concluded that Defendant's retirement plan permitted retirement at the option of either Trailways or the employee at any time after the employee reached the age of fifty-five (55). The Court further concluded that, for the purpose of the §4(f)(2) exception to the ADEA, there was no meaningful distinction between mandatory and optional early retirement plans, in accord with decisions rendered by the Third and Ninth Circuits. 5/ Finally, the Court concluded that Defendant "acted as permitted by its retirement plan," that it did not violate the provisions of that plan, and that, therefore, "in exercising its option to

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5/ Marshall v. Hawaiian Telephone Co., 575 F.2d 763 (9th Cir. 1978); Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978).

retire [Mr.] Carpenter, Trailways 'observed the terms' of the plan as required by §4(f)(2)."

With respect to Plaintiff's contention that Defendant's plan was a "subterfuge," the Court again analyzed the facts in the record before it and determined that the plan was not adopted as a "stratagem or artifice to evade the requirements of the ADEA." To the contrary, the Court concluded that the plan was a "legitimate instrument." Regarding the same "subterfuge" issue, the Court also rejected Plaintiff's claim that Defendant had misrepresented or concealed the terms of its plan to the employees. 6/ On the basis of the above findings and conclusions, the Court held that Defendant's retirement plan satisfied the criteria necessary for exemption under §4(f)(2)

6/ It should be noted that the "Highlights" brochure specifically stated that the actual retirement plan was the controlling document and that such was available to the employees.

and that Mr. Carpenter's retirement pursuant to that plan was not violative of the ADEA.

Plaintiff contends that the decision of the Court below is in conflict with decisions from the Fourth, Seventh, and Ninth Circuits. 7/ Defendant submits that those decisions are inapposite to that of the Sixth Circuit and that, therefore, no decisional conflict among the Circuits exists.

Thus, in each of the cases cited by Plaintiff as "conflicting," the respective Court concluded that the plan involved contained no provision permitting the employer to involuntarily retire the employee prior to age sixty-five (65). 8/ Accordingly, each Court concluded that the §4(f)(2) exemption did not

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7/ Benzel v. Valley National Bank of Arizona, 633 F.2d 1325 (9th Cir. 1980); E.E.O.C. v. Baltimore and Ohio Railroad Company, 632 F.2d 1107 (4th Cir. 1980); Sexton v. Beatrice Foods Co., 630 F.2d 478 (7th Cir. 1980).

8/ 633 F.2d at 1327; 632 F.2d at 1110; 630 F.2d at 485.

apply and that the ADEA had been violated. In the instant case, however, the Sixth Circuit concluded that there was such a provision in Defendant's plan, which was not concealed from the employees, and that Defendant acted in accord therewith when it involuntarily retired Plaintiff. Accordingly, the Court held that the §4(f)(2) exemption applied and that the ADEA had not been violated.

The above makes clear that the "conflict" alleged by Petitioner does not exist. Furthermore, even assuming that there is a "conflict," it is not one which warrants the Supreme Court's attention because the 1978 amendments to §4(f)(2) of the ADEA settled the entire issue of whether involuntary retirements were permitted. 9/ In these circumstances, therefore, the instant case does not warrant this Court's attention.

9/ Such retirements on the basis of age now are prohibited. See pages A-22 and A-23 of Mr. Carpenter's Petition.

B. There Is No Important Question Of Federal Law To Be Addressed

As hereinbefore noted, §4(f)(2) of the ADEA was amended in 1978 to prohibit age-motivated, involuntary retirements, regardless of whether they were mandatory or optional. That amendment overruled this Court's decision in United Airlines, Inc. v. McMann, 434 U.S. 192 (1977), which held that the ADEA did not prohibit early retirement pursuant to a mandatory retirement provision in a *bona fide* plan, even if age was the sole basis for that action. It also answered the question not addressed by this Court in McMann, i.e., whether the same result would obtain if the retirement provision were optional. In light of this Congressional action, which occurred in 1978, the issue of age-motivated, involuntary retirements and the ADEA has been resolved, and cases such as the instant one cannot recur. Accordingly, there is no impor-

tant question of federal law to be addressed by this Court.

Moreover, the Sixth Circuit's opinion was based on its analysis and interpretation of the facts involved in this case. Thus, based on the evidence, it concluded that the terms of Defendant's retirement plan permitted Defendant to retire Plaintiff, that Defendant acted in accord with its plan, and that the plan was not a "subterfuge." Plaintiff's complaints regarding those conclusions, which appear throughout his Petition, do not make this case one involving an "important" federal question. To the contrary, it is well established that this Court will not review decisions from lower courts which are based on factual determinations. N.L.R.B. v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178-179 (1938); *see* United States v. ITT Continental Baking Co., 420 U.S. 223, 226-227, footnote 2 (1974).

C. There Is No Conflict With An Applicable Decision Of This Court

It is undisputed that this Court never decided the question of whether a retirement pursuant to an optional early retirement provision was permitted by §4(f)(2) of the ADEA. Accordingly, there can be no conflict between the Sixth Circuit's decision and a decision of this Court on that issue.

Plaintiff asserts that the Sixth Circuit's finding of no misrepresentation or concealment by Defendant regarding its retirement plan is in conflict with this Court's definition of "subterfuge." However, a review of that portion of the Petition supporting the assertion reveals that Plaintiff is not alleging that the instant case is one where the Sixth Circuit failed to follow clear Supreme Court precedent. To the contrary, his exclusive concern is with the aforementioned factual conclusions on the "subterfuge" issue made by the Sixth Circuit, which were adverse

to his interests. Clearly, such a complaint is not sufficient to warrant review by this Court.

CONCLUSION

For all of the reasons stated above, Defendant submits that Plaintiff's Petition fails to satisfy any of the criteria established by this Court for exercising its discretion in favor of reviewing a lower court's decision. Accordingly, Defendant urges this Court to deny the Petition For Writ of Certiorari filed in this case by Plaintiff.

Respectfully submitted,

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April 16, 1981